WHEELER, DIULIO & BARNABEI, P.C.
BY: Anthony DiUlio, Esquire
Attorney I.D. No.: 312763
One Penn Center - Suite 1270
1617 JFK Boulevard
Philadelphia, PA 19103
Phone: (215) 568-2900
Email: adiulio@wdblegal.com

Attorney for Ms. Aguiar(s)

LISA AGUIAR and RODNEY AGUIAR vs. STATE FARM FIRE AND CASUALTY COMPANY,	COURT OF COMMON PLEAS PHILADELPHIA COUNTY CIVIL ACTION OCTOBER TERM, 2016 NO. 01169

POST-TRIAL SUBMISSION

I. STATE FARM BREACHED ITS CONTRACTUAL DUTIES, VIOLATED THE UTPCPL, AND DID SO IN BAD FAITH.

Your Honor should find in favor of Ms. Aguiar and against State Farm on all counts because the Amendatory Endorsement ("Endorsement") that State Farm unilaterally added to Ms. Aguiar's policy was unconscionable. Moreover, State Farm is liable for its violation of the Unfair Trade Practices and Consumer Protection Laws because of its fraudulent misrepresentations and misfeasance. Furthermore, State Farm handled this entire claim in bad faith. Finally, even if the endorsement is found to be valid and enforceable, all of Ms. Aguiar's claimed damages are covered under this policy.

A. State Farm's Amendatory Endorsement is Unconscionable and Thus Unenforceable.

Unconscionability is a two-part test. "First, *one of the parties to the contract must have lacked a meaningful choice* about whether to accept the provision in question. Second, the

challenged *provision must unreasonably favor the other party* to the contract." Koval v. Liberty Mut. Ins. Co., 366 Pa. Super. 415, 423-24 (1987) (internal quotations omitted) (emphasis added).

The goal of interpreting a contact of insurance is to ascertain the intent of the parties through the language of the written instrument. Standard Venetian Blind Co. v. Am. Empire Ins. Co., 503 Pa. 300, 305 (1983). However, because of the "manifest inequality of bargaining power between an insurance company and a purchaser of insurance," a court may deviate from the plain language of a contract to determine if the contract is one of adhesion. Standard Venetian Blind Co. v. Am. Empire Ins. Co., 503 Pa. 300, 307 (1983). The fundamental nature of a contract of adhesion is such that the consumer who is presented with it has no choice but to either accept the terms of the document as they are written or reject the transaction entirely. Todd Heller, Inc. v. UPS, 2000 Pa. Super. 171 (2000). "The parties are not of equal bargaining power and the weaker party must adhere to the terms of a form contract which are not negotiable. In other words, the terms are not bargained for, but rather dictated by the insurer." Rudolph v. Pa. Blue Shield, 553 Pa. 9, 17 (1998). "Once a contract is deemed to be one of adhesion, its terms must be analyzed to determine whether the contract as a whole, or specific provisions of it, are unconscionable." Rudolph, 553 Pa. at 17 (citing Denlinger Inc. v. Dendler, 415 Pa Super. 164 (1992)). If terms of an otherwise enforceable contract are found to be unconscionable, those terms are void. See, 13 Pa.C.S. §2302.

In the case at bar, the policy of insurance issued by State Farm ("the Policy"), is undoubtedly one of adhesion. Ms. Aguiar had no bargaining power in determining the terms of the contract, but rather was presented with a Policy on a take it or leave it basis. Clearly, the Policy was one of adhesion. There was no negotiation as to the terms of the Policy, rather Ms. Aguiar had to accept all coverages and exclusions as they existed, or reject the Policy entirely.

Not only was the Policy, as a whole, one of adhesion, but the Endorsement was also one of adhesion.

Ms. Aguiar lacked any meaningful choice to accept the Endorsement, which unreasonably favored State Farm. These two points are beyond contention. Ms. Aguiar received a notice in the mail that the previous "tear-out" provision had been amended. See, Exhibit 1, pg. 33-34. Ms. Aguiar had no say in this change of coverage, the notice that she received already contained the new language of the Policy. Not only did Ms. Aguiar lack a meaningful choice to accept the Endorsement, she had no choice at all. The language of the Policy was unilaterally changed, and the premiums adjusted, with zero input from Ms. Aguiar. She testified:

> Q. All right. Did State Farm or any agent from State Farm ever reach out and speak to you about this important notice?
> A. No. (Trial Transcript, pg. 29, ln. 17-20).
>
> Q. Did State Farm ever provide you a choice, saying look you can add this or not add it to the policy?
> A. No.
> Q. Did you have any say, whatsoever, to this getting added into the policy?
> A. No. (Trial Transcript, pg. 30, ln. 8-13)

Not only did Ms. Aguiar testify to this, but State Farm's own representative John Cashwell ("Cashwell") agreed:

> Q. When it just comes to this provision, there was no choice given to [Ms. Aguiars] what not to add or add it to the policy, correct?
> A. Correct. If they wish to maintain their policy, then this endorsement came on. (Trial Transcript pg. 134, ln. 2-6)

It is indisputable that Ms. Aguiar lacked any meaningful choice regarding the terms of this policy, and more specifically, this change to the policy.

Looking past the clear contract of adhesion, this Endorsement also unreasonably favored State Farm. Insurance Expert Michael Pacchione ("Pacchione") opined:

> Q. Is there any question in your mind that this provision unreasonably favors State Farm?
> A. *There is no doubt in my mind that it unreasonably favors State Farm***.** (Trial Transcript, pg. 100, ln. 14-17) (emphasis added).

This point is further validated because at the time at which State Farm issued its Endorsement, the policy contained a provision known as the Liberalization Clause. This Clause mandates that any change in the Policy which broadens coverage, must be immediately issued to all policy holders. Most tellingly, the Endorsement was not issued immediately upon acceptance by the insurance department on all policies, but rather State Farm waited until the renewal period. Pacchione explained:

> A. … the policy has what is called a liberalization clause, Section I. Section II, common conditions. I can review it to see if its in there. From my understanding, from my experience, are that provisions – if an insurance company broadens coverage during a policy term with no additional premium charge, then it has to be made available immediately. You can't wait for a renewal order to extend that broader coverage. (Trial Transcript, pg. 95, ln. 2-12)
>
> Q. Let me rephrase. The fact that this provision was added onto Ms. Aguiar's policy at the renewal, after it had been approved and added to other policies by State Farm, does that tell you anything regarding State Farm's knowledge regarding whether or not this increases, decreases, or keeps the same policy language?
> A. It indicates that State Farm believes that it wasn't a more liberal provision. It doesn't necessarily indicate that they believed it to be more restrictive. It means that they did not view it to be more liberal. (Trial Transcript, pg. 96, ln. 15- pg. 97, ln.1)

By waiting until the renewal period, State Farm admitted that this Endorsement did not broaden coverage. Vitally, State Farm's own representative and employee of 23 years, Cashwell, could not think of a single situation in which the old tear-out provision would not provide coverage, but the new Endorsement would.

> Q. Can you give me one example of when the old language provided less coverage than the new language?
> A… There are some cases, many cases, where the new and old are similar. There are some cases where the old would provide coverage that the new does not. (Trial Transcript, pg. 131, ln. 6-16).

> Q. You would agree with me that the difference in coverage is that the [new] version would provide less coverage than the [old] version, correct?
> A. There are some cases, correct.
> Q. *Can you give me one example of the situation when the [old] portion would not provide coverage but the [new] portion would?*
> A. *Off the top of my head, I cannot.* (Trial Transcript, pg. 129, ln. 9-16) (emphasis added)
>
> Q. *Okay. So there is no scenario that you can think of, being with State Farm for over 20 years, where the [new] portion would provide coverage and the [old] portion would not, correct?*
> A. *That is correct.* (Trial Transcript, pg. 29-30, ln 24-3) (emphasis added).

As Mr. Cashwell explained, there are situations, including the current case, where coverage was provided under the old terms, but not under the new Endorsement.

> Q. Okay. If there were a break in that line that caused it to happen, the access would be covered, correct, under the old language?
> A. If there were a break in the line, then yet. (Trial Transcript, pg. 132, ln. 5-8.)

It was also made clear that State Farm's benefit for this unilateral and unconscionable change would not be limited to just this one loss. By way of example, Cashwell testified that many of the homes in Levittown alone would require access to fix sewer lines that break and that as a result, State Farm would have a "reduction in the amount of money there we're able to pay out." (Trial Transcript, pg. 187, ln. 10-22).

This unilateral change unreasonably favored State Farm by narrowing the coverage provided, without giving policy holders an opportunity to accept or reject the change. Quite simply, under the new Endorsement coverage can only get worse for policy holders and only get better for State Farm; there is no situation where the new Endorsement would cover something the old endorsement did not. This Endorsement must be seen as unreasonably favoring State Farm.

Because the Endorsement is unconscionable, it is a violation of public policy and cannot be enforced. <u>See</u>, 13 Pa. C.S. §2302. So the question becomes, without this endorsement, what is

State Farm liable for? Luckily for us, the question is clear and not in dispute. State Farm owes for this loss.

With the endorsement removed, the old policy language, which is still present in the policy itself and only removed by the endorsement, would take effect. It is undisputed that under the old policy, the access to this pipe is a covered loss under this policy.

> Q. Okay. If there were a break in that line that caused it to happen, the access would be covered, correct, under the old language?
> A. If there were a break in the line, then yes. (Trial Transcript, pg. 132, ln. 5-8.)

While State Farm may attempt to argue now, for the first time, that the break in the drain line did not cause this loss, it is without merit or fact, and done in bad faith to advance its attempt circumvent payment of a covered loss.

State Farm hired Mormondo's Plumbing for the purpose of evaluating the plumbing and to determine the cause of the overflow. See, Trial Transcript, pg. 203, ln. 16-19. This is standard in the insurance industry and State Farm relied on Mormondo to make this determination. Id. at pg. 203-204, ln 20-1. It is undisputed that Mormondo found breaks in the line;

> Q. It was Mormando's that found there were breaks in the line, correct?
> A. That was their indication, yes. (Trial Transcript pg. 204, ln. 2-4).

.
In addition, it was testified to that State Farm was not contesting any of the findings of Mormond's

> Q. Was anyone ever contesting the findings of Mormondo's?
> A. Not that I'm aware of. Someone may have been, but I don't know.
> Q. Did State Farm ever (sic) contest the findings of Mormando's?
> A. No. (Trial Transcript, pg. 210, ln. 1-7).

Last but not least, it was State Farm's determination and position, based on its investigation and its reliance on Mormondo's, that the overflow from the toilet was caused by the breaks in the line. See, Exhibit 8, State Farm Denial Letter from May 4, 2016 ("Unfortunately, there is no

coverage for the cost of repairing or replacing the deteriorated and broken drain line which caused the fill up, or for the access to this drain line through the slab.") Therefore, State Farm is liable for the full amount of damages owed to Ms. Aguiar. Because the Endorsement is unconscionable, and Ms. Aguiar was indisputably covered under the old terms, her current loss is covered and State Farm owes for this covered loss.

B. State Farm Violated the Unfair Trade Practices and Consumer Protection Law by it Fraudulent Misrepresentations and Misfeasance.

State Farm has confused and convoluted its own policy endorsement over and over again in an attempt to avoid liability and mislead its insured. This conduct is not only unreasonable, but manipulative and deceptive. The extent of State Farm's manipulation continued all the way through the trial and its conduct is a violation of the Unfair Trade Practices and Consumer Protection Law (UTPCPL").

The UTPCPL provides a private right of action for anyone who "suffers any ascertainable loss of money or property" as a result of "an unlawful method, act or practice." 73 P.S. §§ 201-1 – 201-9.2. Upon a finding of liability, the court has the discretion to award "up to three times the actual damages sustained" and provide any additional relief the court deems proper. 73 P.S. §§ 201-2(4) lists twenty enumerated practices which constitute actionable "unfair methods of competition" or "unfair or deceptive acts or practices." Under Pennsylvania Law, it is generally recognized that an insurer can be held liable under the UTPCPL if *fraudulent misrepresentations* were employed to foster the sale of the policy. However, the UTPCPL also contains a catchall provision at 73 P.S. § 201-2(4)(xxi), which was amended in 1996 by the General Assembly to add "*deceptive conduct*" as a prohibited practice, which can apply in the context of insurance.

Currently, the catchall provision prohibits "fraudulent or deceptive conduct which creates likelihood of confusion or of misunderstanding." Bennett v. A.T. Masterpiece Homes at

Broadsprings, LLC, 40 A.3d 145, 151-152 (Pa. Super. Ct. 2012)] (internal citations omitted); see also, Agliori v. Metropolitan Life Ins. Co., 879 A.2d 315, 318 (Pa. Super. Ct. 2005) (purpose of UTPCPL is to protect consumer public and eradicate unfair or deceptive business practices; foundation of UTPCPL is fraud prevention, and its policy is to place consumer and seller of goods and services on more equal terms; courts should construe its provisions liberally to serve the remedial goals of the statute). When considering the effect of the catchall provision after its amendment in 1996, the Court in Weiler v. SmithKline Beecham Corp., stated the following:

> …the insertion of the phrase "or deceptive" implies that either deceptive or fraudulent conduct constitutes a violation of the Catchall Provision and that deceptive conduct is not the same as fraudulent conduct. Moreover, it is clear from the legislative history of the Catchall Provision amendment that the General Assembly's intent was to expand the scope of the UTPCPL… Given these circumstances, the Court must conclude that the purpose of the 1996 amendment was to eliminate the requirement that a Ms. Aguiar plead all the elements of fraud to sustain a claim under the Catchall Provision. Weiler v. SmithKline Beecham Corp., 53 Pa. D. & C.4th 449, Slip op. at 3-6 (C.P. Phila. 2001); Carolyn L. Carter, ed., Pennsylvania Consumer Law § 2.5.4.21(B) (stating that the 1996 Amendment allows Catchall Provision claims without proof of each element of common law fraud).

To establish a claim under the UTPCPL's catchall provision, a party must either prove the elements of common-law fraud, *or that State Farm's deceptive conduct caused harm to the Ms. Aguiar.* See, Weiler v. SmithKline Beecham Corporation, 53 D.&C.4th 449 (C.P. Phila. 2001); Foultz v. Erie Insurance Exchange, 2002 WL 452115 (C.P. Phila. Mar. 13, 2002) (emphasis added).

The test for distinguishing "a cause of action in tort growing out of a breach of contract is whether there was an improper performance of a contractual obligation (*misfeasance*) rather than the mere failure to perform (*nonfeasance*)." See, Raab v. Keystone Insurance Co., 412 A.2d 638, 639 (Pa. Super. Ct. 1979), appeal dismissed, 437 A.2d 941 (Pa. 1981), see also, 73 P.S. §201-1 et seq. This bar against claims for nonfeasance arises commonly in the insurance context, i.e.

allegation of an insurer's failure to pay benefits is mere nonfeasance and therefore, is not actionable under the UTPCPL.

Due to State Farm's continued manipulation regarding the Endorsement in question, it is necessary to look at all of the misrepresentations and deceptive conduct in its entirety, all in one place. It is important to note that the endorsement was drafted by State Farm. See, Trial Transcript, pg. 199, ln. 22-25. Those deceptions and misrepresentations are as follows:

1. State Farm indicated in the Endorsement that this endorsement was "not intended to change coverage. See, Exhibit 1, page 33. However, we now know that the endorsement does, in fact, eliminate coverage that the original policy would have covered.

    Q. In making the shift it did not keep all things equal, it did in fact change coverage?
    A. It clarified coverage. And in some cases, changed it, yes.
    …
    Q. And when it changed coverage it took coverage away?
    A. Yes. (Trial Transcript, pg. 202, ln. 15-25).

    This was a clear misrepresentation by State Farm meant to make the Aguiar's and all policyholders believe that State Farm truly intended for nothing to changing.

2. State Farm indicated in the Endorsement that "this change could potentially reduce or eliminate coverage depending on how it is interpreted". However, we now know that according to State Farm's representative, there is only one way to interpret this endorsement:

    Q. Let me put it this way. Do you have multiple ways of interpreting this policy language?
    A. This Policy?
    Q. Yes.
    A. No. I believe it is fairly clear.
    Q. Okay, so there is nothing to interpret in your opinion?

> A. In my opinion, this says that we only owe to access plumbing or access the specific point where water or steam has escaped as long as there is a covered water loss. To me, that's the only thing it says.
> Q. So there is no other interpretation in your understanding under this policy?
> A. The way I read this, that is correct. (Trial Transcript, pg. 205, ln. 11-25).

More importantly, as discussed at length above, the only way to interpret this language after a thorough review of the law and testimony of State Farm, is that it reduces coverage. This was a misrepresentation by State Farm as it was trying to imply that there were possible ways to interrupt this language that the reduction was dependent on an unidentified individual's interpretation when it did, in fact, reduce coverage.

3. State Farm indicated that this important notice was included in the certified policy but State Farm confoundingly represented that this notice is not part of the policy reviewed by its adjusters.

> Q. Does this notice, or anywhere in the policy, indicate who is the person who gets to interpret this language?
> A. There is no indication of that, it just indicates that depending on interpretation. And just to make clear, the Important Notice is not part of the policy. The FE-2340 would be part of the policy.
> Q. This Important Notice is included in the certified copy of the insurance policy, correct?
> A. That's my understanding…
> Q. This is the policy, correct?
> A. This is the policy, but what I'm suggesting to you is when I review a copy of the policy, the Important Notice portion of it is not included in the copy of the policy, this is a notification to the policyholder.
> Q. …the Important Notice isn't in what you review?
> A. That's correct.

4. The endorsement added number "13. Tear Out" to "Additional Coverages" but we learned, and is discussed at length above, that this "Additional Coverage" was actually a reduction in the overall coverage provided to Ms. Aguiar. This was a clear and material misrepresentation that Ms. Aguiar was getting additional coverage when

in fact they received less coverage. The additional extent of State Farm's testimony was so nonsensical and lengthy that it would not be prudent to recopy it to this Memorandum. (Trial Transcript, pg. 195, ln. 12 - 198, ln. 2.)

5. Finally, State Farm admitted that the intent of this endorsement was to clarify coverage, rather than the stated intent which was to not change coverage. While this distinction may seem minor, the latter implies that nothing is changing while the former implies, and in fact did, reduce the coverage. In reviewing the endorsement language, "Although not intended to change coverage…" State Farm testified;

> Q. Based off of that language, you would agree with me that State Farm's intent was to not change the policy coverage from the old language to the new language; is that correct?
> A. I would suggest that what the intent of what this is, is to clarify coverage.
> Q. Okay. You know the words on the page say they do not intend to change coverage correct?
> A. Right.
> Q. And you would agree with me that based on just the words on the page alone and the fact that you've worked at State Farm for 20 plus years. As their representative, you agree that the purpose was to not change the coverage, correct?
> A. I don't know that I would - - what I'm suggesting to you is that this clarifies coverage. (Trial Transcript, pg. 200, ln. 5-20).

This difference is critical because it shows that State Farm misrepresented the purpose of this endorsement from keeping all things equal to making a clarification that reduced coverage.

> Q. In making the shift it did not keep all things equal, it did in fact change coverage?
> A. It clarified coverage. And in some cases, changed it, yes.
> …
> Q. And when it changed coverage it took coverage away?
> A. Yes. (Trial Transcript, pg. 202, ln. 15-25).

In the present case, State Farm made material misrepresentations regarding the change in Ms. Aguiar's policy to induce her continued business. Because of Ms. Aguiar's justifiable

reliance on State Farm's material misrepresentation of the Policy, she ultimately suffered harm through the denial of her claim for the covered loss here at issue. Although "reliance" is no longer a required element for a Ms. Aguiar to succeed under a deceptive practice claim, Ms. Aguiar's "reliance" has nevertheless been established here.

In the instant case, Ms. Aguiar brought a claim under the UTPCPL against State Farm. State Farm contends that Ms. Aguiar's UTPCPL claim is insufficient to demonstrate misfeasance, arguing her allegations only amount to nonfeasance. However, to the contrary, Ms. Aguiar has made allegations against State Farm sufficient to constitute misfeasance. Materially, she has demonstrated that she relied upon the deceptive conduct of State Farm in multiple instances, causing her to suffer harm. A professional organizations deceptive conduct harming consumers, is precisely what the UTPCPL was designed to prevent. The reliance and harm is as simple as showing that Ms. Aguiar continued insurance with State Farm, under the impression that it had not changed the policy and in fact added an additional coverage term. Upon relying on that, Ms. Aguiar has now been denied for a claim which absent the endorsement, would otherwise be covered.

In refuting Ms. Aguiar's claim of misfeasance, State Farm cites to Leo v. State Farm Mut. Auto. Ins. Co., 939 F. Supp. 1186 (E.D. Pa. 1996). In that case, the Court considered an insured's UTPCPL allegations against her insurer, which included:

> (1) Misrepresenting pertinent contract provisions relating to Ms. Aguiar's and State Farm's obligations; specifically, refusing to evaluate the file until obtaining a statement under oath.
>
> (2) Failing to acknowledge and act promptly upon written or oral communications with respect to the claim, such as not immediately forwarding a copy of Dr. Stone's report to Ms. Aguiar and refusing to look at any material in the file until obtaining a statement under oath.
>
> (3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising out of insurance policies.

(4) Refusing to make an offer without reviewing the available information derived from the initial investigation.

(5) Not attempting in good faith to effectuate prompt, fair and equitable settlement of claims in which the company's liability under the policy has become reasonably clear.

(6) Failing to promptly provide a reasonable explanation of the basis for refusing to make a settlement offer and, in fact, misleading Ms. Aguiar's counsel to believe that the file would be evaluated based upon Dr. Stone's report.

See, Leo, 939 F. Supp at 1193. The Court understood these allegations as merely showing that the Ms. Aguiar's insurer failed "to pay insurance benefits in a timely manner," and thus, amounted to mere nonfeasance. Id.

Leo is distinguishable from the present case because it was decided in the context of a motion for summary judgment, whereas here, State Farm's motion for summary judgment has already been denied. Furthermore, in no way does the ruling in Leo indicate that an insurer's deceptive conduct, i.e. its: misrepresenting policy provisions; failing to investigate, evaluate, negotiate or otherwise handle the claim properly; failing to provide a reasonable basis for denying the claim, does not amount to misfeasance.

As an initial matter, an insurer's misrepresentation of policy provisions or the terms and conditions of such, and failing to provide insurance as promised to insureds by improperly limiting coverage have both been factors that constitute misfeasance.

In Pa. Chiropractic, the Court explained that by misrepresenting the terms and conditions of health care plans, the State Farm-health insurer placed its "financial needs over the health care needs of their subscribers." Pa. Chiropractic Ass'n v. Indep. Blue Cross, Nos. 2705, 111113, 2001 Phila. Ct. Com. Pl. LEXIS 112, at *52 (C.P. July 16, 2001); see also, Perkins v. State Farm Ins. Co., 589 F. Supp. 2d 559, 567 (M.D. Pa. 2008) (finding sufficiently plead misfeasance based on insured's allegations of State Farm's improper performance, i.e. intentionally/knowingly used a biased professional review organization to obtain a determination as to the

reasonableness/necessity of treatment so as to allow it to deny claims). Similarly, in Lites v. Great American Ins. Co., misfeasance was found based on allegations of: 1) the absence of a reasonable basis for denying benefits; 2) reckless disregard of the lack of a reasonable basis for denial; 3) woefully insufficient settlement offers; and 4) other bad faith claims, i.e. forcing the insureds to enter unnecessary litigation and improperly investigating claims. The Court concluded that Ms. Aguiar's UTPCPL assertions "allege more than mere nonfeasance." Lites, 2000 U.S. Dist. LEXIS 9036 at 17*. Lastly, in Carlucci v. Maryland Cas. Co., the Court held that the Ms. Aguiar's allegations against her insurer for its "failure to investigate, evaluate, negotiate and otherwise handle the claim properly," sufficiently set forth alleged misfeasance to bring a claim under the UTPCPL. Carlucci, 1999 U.S. Dist. LEXIS 3156 (E.D.Pa. Mar. 15, 1999). Based on this line of case law, all of which were decided subsequent to Leo, it is evident that the Ms. Aguiar here has made allegations pleading more than nonfeasance under the UTPCPL.

First, like Pa. Chiropractic, here, State Farm, misrepresented the provisions and the terms and conditions of the Policy. The Court in Pa. Chiropractic focused on the insurer's alleged material misrepresentation in the imposition of "arbitrary limits and designations on 'chronic' versus 'acute' conditions," concluding that such an allegation was sufficient to state a claim of misfeasance. Pa. Chiropractic, 2001 Phila. Ct. Com. Pl. LEXIS 112 at 51. Similarly here, Ms. Aguiar avers that State Farm has imposed an arbitrary limitation on coverage for access within the "Additional Coverages" provision of her policy.

Pacchione testified that a restriction in a policy's access provision does not "make sense" from the perspective of an insured nor a plumber who "actually had to repair or replace" a damaged line. See, Trial Transcript, pg. 92, ln 1-3. Further, as already explained above, the Endorsement is far more restrictive than the original policy. Likewise, this same language is far

more restrictive than any policy language used by any other insurer in Pacchione's fifteen years working for State Farm and the following eight years since becoming a certified public adjuster. See, Trial Transcript, pg. 92, ln 8-10. Pacchione specifically testified as to the restrictive nature of this provision. At trial, he explained that, "[t]here are qualifying terms… placed in the policy," that were added to limit coverage to only the "part of the building and the specific point of the system that leaked," and that such language would technically prevent a plumber from making a necessary repair to align an entire sewer line. Id.

The Endorsement, and State Farm's reasoning for denying Ms. Aguiar's claim under the Endorsement, clearly shows a blatant misrepresentation of the Policy provisions. Prior to State Farm's enactment of the Amendatory Endorsement, there was a single provision under "Section 1 - Losses Not Insured," which stated:

> If loss to covered property is caused by water or steam not otherwise excluded, we will cover the cost of tearing out and replacing any part of the building necessary to repair the system or appliance. See Exhibit 1, pg. 16.

Ms. Aguiar's damage, water escaping from a cracked pipe, would undeniably have been covered under this provision. The pipe itself would be excluded, but the cost to access the broken pipe would be covered.

> Q. Okay. If there were a break in that line that caused it to happen, the access would be covered, correct, under the old language?
> A. If there were a break in the line, then yes. (Trial Transcript, pg. 132, ln. 5-8.)

State Farm thereafter amended the Policy, removing the tear out language and adding the Endorsement under "Additional Coverages." State Farm sent only an "Important Notice" with conflicting language which read:

> Although *not intended to change coverage*, this change could potentially reduce or eliminate coverage *depending on how it is interpreted* and, in that regard, should be viewed as either an actual or potential reduction in or elimination of coverage. See Exhibit 1, page 33.

In this notice, State Farm expressly represented to Ms. Aguiar that this Endorsement was *not intended to change coverage*, and in the same breath, conceded that the same Endorsement could reduce or even eliminate coverage "*depending on how it is interpreted*." See, Exhibit 1. Ultimately, this vague "interpretation language" was used by State Farm as its basis for denying Ms. Aguiars' claim, where it contended that the costs of access to repair the damaged pipe was not a covered peril under the Policy. However, State Farm denied the claim despite the existence of a provision in the very same Endorsement, which explicitly reads:

> We will also pay the reasonable cost you incur to tear out and replace *only the particular part* of the building or condominium unit owned by you *necessary* to *gain access* to the *specific point* of that system or appliance from which the water or steam escaped. See, Exhibit 1, page 33.

This "Additional Coverages" provision is inaccurately titled, because it allows State Farm to eliminate/limit coverage that would otherwise be rightfully afforded to Ms. Aguiar under the original policy.

Per the interpretation of Pacchione, this endorsement "drastically reduces coverage." See, Trial Transcript, page 93, ln 20. Continuing, Pacchione articulated that he did not "know why this would be labeled [as a] Potential Reduction in Coverage when it was *clearly* [and] *unambiguously* a pure reduction in coverage." See, Trial Transcript, page 94, ln 1-4. Ms. Aguiar's own testimony at trial confirmed her reasonable expectation that the "Additional Coverages" provision would increase her coverage, rather than eliminate it. See, Trial Transcript, page 30, ln 14-19.

The evidence shows a blatant misrepresentation by State Farm. Such a material misrepresentation of the Policy ultimately resulted in the denial of Ms. Aguiar's claim, causing

her to suffer an ascertainable loss, and as such, constitutes misfeasance for which State Farm is liable under the UTPCPL. As such, Ms. Aguiar is seeking treble damages for the breach.

C. State Farm Acted in Bad Faith in the Adjustment and Litigation of This Loss.

Ms. Aguiars' bad faith claims arise from a statute enacted by the Pennsylvania Legislature, 42 Pa.C.S.A. §8371, effective July 1, 1990, which provides as follows:

> § 8371. Actions on insurance policies
>
> > In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
> > (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
> > (2) Award punitive damages against the insurer.
> > (3) Assess court costs and attorney fees against the insurer.

Bad faith on the part of an insurer is "any frivolous or unfounded refusal to pay proceeds of a policy," and while it is not necessary that the insurer's conduct be fraudulent, bad faith conduct "imports a dishonest purpose and means a breach of a known duty ... through some motive of self-interest or ill will." Romano v. Nationwide Mut. Fire Ins. Co., 646 A.2d 1228 (Pa.Super. 1994), quoting Black's Law Dictionary 139 (6th ed. 1990).

In 1994 the Superior Court of Pennsylvania clarified the meaning of bad faith in Terletsky v. Prudential Property & Casualty Ins. Co., as follows:

> "Bad faith" on part of the insurer is *any frivolous or unfounded refusal to pay proceeds of a policy*, it is not necessary that such a refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e. good faith and fair dealing), through some motive or self-interest or ill will; mere negligence or bad judgment is not bad faith.
>
> Terletsky, 649 A.2d 680, 688 (Pa. Super. 1994), appeal denied 659 A.2d 560 (1995) (citing Black's Law Dictionary, 139 (6th Ed. 1990)).

Bad faith on the part of the insurer must be proven by the insured by clear and convincing evidence that "the insurer did not have a reasonable basis for denying benefits under the policy and that the insurer knew of or recklessly disregarded its lack of reasonable basis in denying the claim." MGA Ins. Co. v. Bakos, 699 A.2d 751, 754 (Pa. Super. 1997). In addition, a bad faith claim may be based on the insurance company's behavior during the course of litigation. O'Donnell v. Allstate Ins. Co.,734 A.2d 901, 907 (Pa. Super. 1999). Bad faith may exist even if no breach of contract occurred. March v. Paradise Mutual Ins. Co., 646 A.2d 1254, 1256 (Pa. Super. 1994).

Bad faith may also exist outside the context of an insurer's denial of coverage or refusal to pay policy benefits. It has been held that bad faith "encompasses a wide variety of objectionable conduct" and that an insurer may also be guilty of bad faith in connection with such things as failing to conduct a good faith investigation of claims, failing to communicate with the insured, misrepresenting policy terms or limits, arbitrarily refusing to accept evidence, and making unreasonable "lowball" settlement offers to an insured. Brown v. Progressive Ins. Co., 860 A.2d 493 (Pa. Super. 2004); Hollock v. Erie Ins. Exch., 842 A.2d 409 (Pa.Super. 2004), *appeal granted*, 893 A.2d 66 (Pa. 2005), *appeal dismissed*, 903 A.2d 1185 (Pa. 2006); Condio v. Erie Ins. Exch., 899 A.2d 1136 (Pa. Super. 2006). Where, an insurer misrepresents the amount of coverage, *arbitrarily refuses to accept evidence of causation*, and otherwise acts in a dilatory manner or forces the insured into a legal proceeding a claim for bad faith will lie. Hollock v. Erie Ins. Exch., 842 A.2d 409, 412-414 (Pa. Super. 2004) (emphasis added).

Several cases have also offered as examples of bad faith "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's

performance." Somers v. Somers, 613 A.2d 1211 (Pa.Super. 1992); Williams v. Nationwide Mut. Ins. Co.,750 A.2d 881 (Pa.Super. 2000)."The Pennsylvania Supreme Court has long held that an insurer must act with the 'utmost good faith' toward its insured." Romano v. Nationwide Mutual Fire Company, 646 A.2d 1228, 1231 (Pa. 1994) (citing Fedas v. Ins. Co. of Pa., 151 A. 285, 286 (1930)).

"An unreasonable interpretation of the policy provisions as well as a blatant misrepresentation of the facts or policy provisions will support a bad faith claim." Corch Const. Co. v. Assurance Co. of Am., 64 Pa. D. & C.4th 496, 515-16 (Pa. Com. Pl. 2003) (citing Hollock v. Erie Insurance Exchange, 54 Pa. D. & C.4th 449 (Luzerne Cty. 2002).

Pennsylvania Code § 146.4 also states in relevant part:

> Misrepresentation of Policy Provisions
>
> (a) An insurer or agent may not fail to fully disclose to first-party claimants pertinent benefits, coverages or other provisions of an insurance policy or insurance contract under which a claim is presented.
>
> (b) An insurer or agent may not fail to fully disclose to first-party claimants benefits, coverages or other provisions of an insurance policy or insurance contract when the benefits, coverages or other provisions are pertinent to a claim.31 Pa. Code § 146.4.

State Farm began its unreasonable conduct as soon as the endorsement was added to Ms. Aguiar's policy, but it didn't end there. State Farm added the provision to Ms. Aguiar's "Additional Coverage" section of her policy, they sent a notice indicating that they were not intending to change coverage, and they increased the premiums to be paid; all of this to actually eliminate coverage from Ms. Aguiar's Policy. State Farm took it even further and doubled down on the unconscionable and misleading policy language all the way through trial, just to save on

the payment of a covered loss. As a result, Ms. Aguiar has incurred an unbelievable delay in the payment of their claim, the stressors associated with any litigation, and most tangibly, attorney's fees. Ms. Aguiar should never have been put in that position, but luckily for the them, the law allows a remedy to tell State Farm, you were unreasonable, you owe for these added costs, and you owe punitive damages because of this unreasonable conduct.

It is preposterous that State Farm is claiming water only escaped from the toilet and therefore the damage does not qualify for tear out coverage. It is undisputed that there was a break in the main line. The reports submitted by Mormando's Plumbing & Drain Cleaning, Inc., Benjamin Franklin Plumbing, and Ms. Aguiars' expert, Michael Pacchione, all confirm the existence of a crack in the pipe. Mr. Pacchione's expert report specifically states that water "escaped from a break in the main drain." See, Exhibit "5". This break ultimately caused the overflow, as admitted in State Farm's own correspondence. See Exhibit 8.

State Farm's continued misrepresentation as to the policy endorsement, most specifically claiming that it was not intending to change coverage and that that it was adding "additional coverage" to the policy, all while increasing the insurance premium, is a material misrepresentation that falls within the bounds of Corch Const. Co. v. Assurance Co. of Am. as an unreasonable interpretation of the policy provisions as well as a blatant misrepresentation of the facts or policy provisions. As such, State Farm is liable for Mr. and Mrs. Aguiar's attorney's fees of 35% as well as punitive damages as determined by the Court.

D. Even if State Farm was not Found Liable for its Violations of the UTPCPL, and This Endorsement is Enforcable, Water Escaped from a Broken Drain Line, and Coverage Must be Afforded.

State Farm's argument that water only escaped from the toilet, and therefore, does not qualify for tear out coverage is unfounded, illogical and inconsistent with the testimony in this

case. Significantly, State Farm's plumber, Ms. Aguiar's public adjuster, and Ms. Aguiar's expert, all confirmed the existence of a break in the pipe. In fact, these cracks in the line were stipulated to by both parties. Pacchione's expert report specifically states that water "escaped from a break in the main drain." See, Exhibit 5, page 3. This break ultimately caused damage to Ms. Aguiar's home, an undisputed covered peril under the policy.

State Farm argued that although the pipe may have been cracked, that is not evidence that it leaked and caused damage. This is confounding, the cracked pipe is undisputed. Pacchione explained how the crack must have leaked into the substructure of the home, triggering coverage. See, Trial Transcript, page 64, ln. 6-14, indicating that the substrate is a built up portion of the home and if hit by Category 3 water, sewage water, it is damage. At trial, it was discussed at length that Ms. Aguiar had sewer flies in her home. The Court can take judicial notice that sewer flies have a life cycle of two weeks and only appear when there is a break in the drain line, allowing them to escape. See, https://entomology.ca.uky.edu/ef615. Crucially, Ms. Aguiar testified that she still had sewer flies in her home five (5) months after the repair. It would be impossible for sewer flies, with a life cycle of two weeks, to still be present five months after the loss, if the pipe was not broken allowing them to continuously escape.

Notably, State Farm did not call its plumber to the stand to testify that there were in fact breaks in the sewer line, but instead decided to call Mr. Joseph Goldey ("Goldey"), the plumber who attempted a fix at Ms. Aguiar's home. Goldey testified that he replaced a section of the lead bend under the washer in an attempt to stop the sewer flies. However, Goldey testified that the sewer flies could be caused by a leak in the sewer line and that his fix "might not end up stopping the sewer flies and [he] would need to look into other options." See, Trial Transcript, page 167 ln. 16- pg. 168, ln. 2. In other words, he was attempting to help but if the flies

continued, which they did, other options would need to be explored. See, Trial Transcript, page 28, ln 5-10. See also, Trial Transcript, page 47, ln 11-25 (Ms. Aguiar noted that the sewer flies where at the property through the sale of the home). The sale of the home was in June of 2018, 4 months after the repair by Goldey, 8 times longer than the life cycle of a sewer fly. The only way that the flies could continue that long is if the lead bend replaced by Goldey was not the only source of water escaping.

As a result of this event, Ms. Aguiar suffered damages estimated by the expert, Dan Shurdich. His estimate was uncontested, and State Farm has provided no counter estimate for this loss. The total amount of damage for the plumbing access and repair was estimated at $33,458.60. See, Exhibit 6. Thus, even if this Court did not accept any of Ms. Aguiar's other claims, State Farm owes, at a minimum, $33,458.60 to Ms. Aguiar.

E. Conclusion

Ms. Aguiar should be awarded her full contractual damages, plus 35% for her attorney's fees, punitive damages, and the award should be trebled as this Honorable Court sees fit.

The Endorsement that State Farm unilaterally added to the Policy, leaving Ms. Aguiar with no choice to accept or reject its terms, was flatly unconscionable. Unconscionability consists of two prongs; 1) that one of the parties lacked a meaningful choice about whether to accept or reject the provision at issue, and 2) that the provision unreasonably favored the other party. Koval v. Liberty Mut. Ins. Co., 366 Pa. Super. 415, 423-24 (1987). Ms. Aguiar had zero choice in accepting or rejecting the terms, the Endorsement already contained the new language of the Policy. Further, the Endorsement unreasonably favored State Farm because it was more restrictive, meaning it covers less perils than the original policy, all while increasing the premiums of insureds like Ms. Aguiar. Because it is unconscionable, it is against public policy

and cannot be enforced. Therefore, the Policy must be read without the Endorsement. State Farm admitted that without the Endorsement, the cost of access would have been covered. Thus, State Farm is liable for the full, uncontested, amount of $33,458.60.

State Farm also violated the UTPCPL and committed bad faith through its fraudulent misrepresentations, misfeasance and unreasonable denial with a reckless disregard of the facts. State Farm added this Endorsement under the title "Additional Coverages" knowing full well that it was actually a reduction in coverage. Furthermore, the Endorsement stated its intention was to not change coverage. Pacchione opined that coverage was unquestionably reduced and State Farm's representative Cashwell could not come up with a single scenario that coverage would be afforded under the new Endorsement but not under the old Endorsement. Not only did State Farm claim to be adding coverage, they increased Ms. Aguiar's premium while reducing coverage. This purposeful, fraudulent misrepresentation and deceptive practice is a violation of the UTPCPL and State Farm should be ordered to pay punitive and treble damages for such.

Even if the Court did not accept Ms. Aguiar's above stated claims, this is still a covered loss under the policy. The policy covers direct physical loss to the property and even under the unconscionable Endorsement, covers the cost to access and tear out the point from which the water or steam escaped. Water escaped from the broken drain line. This is evidenced by the fact that Ms. Aguiar had sewer flies, which have a life cycle of two weeks, in home four (4) months after the loss. State Farm's failure to address this covered loss, and forcing of Ms. Aguiar to bring a lawsuit to recover the money she is rightfully owed further evidences their bad faith.

In conclusion, State Farm created an unconscionable policy endorsement which they unilaterally added to Ms. Aguiar's policy. They then used this Endorsement to deny the access coverage to her broken drain pipe, which would have been indisputably covered under the

original policy that Ms. Aguiar procured. State Farm violated the UTPCPL through their fraudulent misrepresentations and handled this entire claim in bad faith. For these reasons, Your Honor should find in favor of Ms. Aguiar, and against State Farm.

WHEELER, DIULIO & BARNABEI, P.C.

BY: *\/s\/ Anthony DiUlio*
ANTHONY DIULIO, ESQUIRE
Attorney for Plaintiffs

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